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Electronically Filed January 22, 2014

8 **UNITED STATES BANKRUPTCY COURT**

9 **DISTRICT OF NEVADA**

10 In re Case No. BK-S-14-10357-abl

11 MARTIFER SOLAR USA, INC., a  
 California corporation,

12 Debtor.

13 Chapter 11

14 **DEBTOR'S MOTION FOR AN ORDER (1)  
 PROHIBITING UTILITY PROVIDERS  
 FROM ALTERING, REFUSING OR  
 DISCONTINUING SERVICE; (2)  
 AUTHORIZING ORDINARY COURSE  
 PAYMENTS TO UTILITY PROVIDERS;  
 (3) DEEMING UTILITY PROVIDERS  
 ADEQUATELY ASSURED OF FUTURE  
 PERFORMANCE; AND (4)  
 ESTABLISHING PROCEDURES FOR  
 DETERMINING REQUESTS FOR  
 ADDITIONAL ADEQUATE ASSURANCE**

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 21 Hearing Date: OST REQUEST PENDING  
 22 Hearing Time: OST REQUEST PENDING

23 Martifer Solar USA, Inc. ("Debtor"), debtor and debtor in possession in the above-captioned  
 24 case (the "Chapter 11 Case"), respectfully submits this motion (the "Motion"), pursuant to Bankruptcy  
 25 Code<sup>1</sup> sections 105(a) and 366, and Local Rule 4001(e), for entry of an Order (1) prohibiting utility

26  
 27 <sup>1</sup> All references to "chapter" and "section" herein shall be to the "Bankruptcy Code" appearing in  
 Title 11 of the U.S. Code; all references to a "Bankruptcy Rule" shall refer to the Federal Rules of  
 28 (footnote continued)

providers from altering, refusing or discontinuing service, (2) authorizing Debtor to pay utility providers in the ordinary course of business, (3) deeming utility providers adequately assured of future performance, and (4) establishing procedures for determining requests for additional adequate assurance.

The requested relief is necessary because uninterrupted utility services are critical to Debtor's ability to sustain its operations. If utility providers cease providing service to Debtor, Debtor's business will be severely damaged thereby jeopardizing the value of its assets. Moreover, the utility providers will not suffer any tangible economic harm as a result of the relief requested herein, as Debtor will compensate the utility providers in full for any postpetition services they provide.

The Motion is made and based upon the following memorandum of points and authorities, the Omnibus Declaration of Klaus Bernhart (the “Omnibus Declaration”), filed in support of Debtor’s First Day Motions, the papers and pleadings on file with the Court in this Chapter 11 Case, and any oral arguments the Court may entertain at the hearing on the Motion.

DATED this 22nd day of January 2014.

**FOX ROTHSCHILD LLP**

By: /s/Brett A. Axelrod  
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## **MEMORANDUM POINTS AND AUTHORITIES**

I.

## **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A).

Bankruptcy Procedure; and all references to a “Local Rule” shall refer to the Local Rules of Bankruptcy Practice of the U.S. District Court for the District of Nevada.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are Bankruptcy Code §§ 105(a) and

II.

## **FACTUAL BACKGROUND**

4. On January 21, 2014 (the “Petition Date”), Debtor filed its voluntary petition for relief under chapter 11 of the Bankruptcy Code.

5. Debtor is continuing in possession of its property and is operating and managing its business as debtor in possession, pursuant to Bankruptcy Code sections 1107 and 1108. See generally Chapter 11 Case Docket.

6. No request has been made for the appointment of a trustee or examiner, and no statutory committee has been appointed. See *id.*

7. The factual background relating to Debtor's commencement of this Chapter 11 Case is set forth in detail in the Omnibus Declaration and is incorporated for all purposes herein by this reference.

8. In the normal course of business, Debtor has relationships with various utilities for, among other things, electricity, natural gas, water, telecommunications, sewage, trash removal and other similar services (“Utility Services”)<sup>2</sup> from numerous companies or divisions thereof (the “Utility Providers”). Debtor intends to continue to use the Utility Providers that are set forth on **Exhibit A**<sup>3</sup>

<sup>2</sup> The Bankruptcy Code does not define “utility,” but Debtor reserves all rights to argue that any entity listed on the Utilities List is a “utility” within the meaning of or entitled to the protection of Bankruptcy Code section 366 and to argue that any such entity is compelled by contractual obligation, law or regulation, to continue to furnish services to Debtor notwithstanding the filing of this Chapter 11 Case.

<sup>3</sup> The listing of any entity on **Exhibit A** attached hereto is not an admission that any listed entity is a utility within the meaning of Bankruptcy Code section 366. Debtor reserves the right to assert at any time that any entity listed on **Exhibit A** is not entitled to adequate assurance pursuant to section 366 of the Bankruptcy Code. Debtor further reserves the right to terminate the services of any Utility Provider at any time and to seek an immediate refund of any Utility Deposit without giving effect to any right of setoff or claim asserted by a Utility Provider against Debtor.

1 attached hereto. Debtor estimates that its average monthly postpetition payments to the Utility  
 2 Providers will aggregate approximately \$7,500.

3 **III.**

4 **RELIEF REQUESTED**

5 9. By this Motion, Debtor seeks an Order (1) prohibiting Utility Providers from altering,  
 6 refusing or discontinuing service relationships or terms to Debtor except as set forth herein; (2)  
 7 authorizing payment of ordinary course payments due to Utility Providers; (3) deeming Utility  
 8 Providers adequately assured of future performance; and (4) establishing procedures for determining  
 9 requests for additional adequate assurance. Such relief is necessary because uninterrupted Utility  
 10 Services are critical to Debtor's ability to sustain its operations. Any interruption of Utility Services,  
 11 even for a brief period, would severely disrupt Debtor's business operations, jeopardize the value of its  
 12 assets and would be extremely harmful to its revenues and profits.

13 10. Debtor believes it has and will have adequate cash to meet all of its necessary  
 14 postpetition operating expenses on a current basis, including payments to the Utility Providers. Debtor  
 15 has specifically included in its budget amounts for payments to Utility Providers, including the payment  
 16 of deposits consisting of sums equal to fifty percent (50%) of Debtor's estimated monthly costs for  
 17 utility services for each of the Utility Providers (each sum, a "Utility Deposit"), based upon an average  
 18 of Debtor's monthly costs for the six (6) months immediately preceding the Petition Date. In addition  
 19 to seeking use of Lender's cash collateral, Debtor is seeking to obtain DIP financing as an additional  
 20 form of payment and adequate protection to Utility Providers.

21 11. Debtor requests the Court authorize it to pay in the ordinary course of business amounts  
 22 due to the Utility Providers for Utility Services provided to Debtor prepetition (the "Ordinary Course  
 23 Payments," and together with the Utility Deposit, the "Adequate Assurance Payments").

24 12. Upon Debtor's payment of the Adequate Assurance Payments, the Utility Providers  
 25 would be deemed adequately assured of Debtor's future performance pursuant to 11 U.S.C. § 366;

26 13. As to new accounts opened by Debtor as debtor in possession, Utility Providers and any  
 27 other company providing Utility Services to Debtor shall treat Debtor like any other customer under  
 28 applicable public utility regulations. If a Utility Provider or any other company providing Utility

1 Services to Debtor discriminates against Debtor on account of its bankruptcy filing by seeking to  
 2 impose an additional or higher deposit or other requirements, Debtor requests that the Court consider  
 3 any such request for relief, with notice to the utility provider, on an expedited basis.

4       14. Debtor requests the Court authorize and direct banks and financial institutions to process,  
 5 honor and pay, to the extent of funds on deposit, any and all prepetition checks, wire transfer requests or  
 6 intercompany transfer requests issued by Debtor, whether pre or postpetition, subject to, and in  
 7 accordance with, the terms of the attached Order. Further, Debtor requests authorization to reissue  
 8 checks, wire transfer requests or intercompany requests where such method of payment has been  
 9 dishonored.

10      15. Except to the extent expressly provided herein and any actions taken pursuant hereto,  
 11 nothing herein shall be deemed: (i) an admission as to the validity of any claim against Debtor; (ii) a  
 12 waiver of Debtor's right to dispute any claim on any grounds; (iii) a promise or requirement to pay any  
 13 claim; (iv) an implication or admission that any particular claim is of a type specified or defined  
 14 hereunder; (v) a request or authorization to assume any agreement, contract or lease pursuant to section  
 15 365 of the Bankruptcy Code; or (vi) a waiver of Debtor's rights under the Bankruptcy Code or any other  
 16 applicable law.

17 **Debtor's Proposed Adequate Assurance Procedures.**

18      16. Debtor seeks to establish reasonable procedures (the "Procedures") by which a Utility  
 19 Provider may request additional adequate assurance of future payment, in the event that such Utility  
 20 Provider believes that its Utility Deposit does not provide it with satisfactory adequate assurance. Such  
 21 Procedures, in particular, would provide that

- 22       a. If a Utility Provider is not satisfied with the assurance of future payment  
           provided by Debtor pursuant to the proposed Utility Deposit, the Utility  
           Provider must serve a written request (the "Request") upon Debtor setting  
           forth the locations for which Utility Services are provided, the account  
           numbers for such locations, the outstanding balance for each account, a  
           summary of Debtor's monthly historical utility use over the past six (6)  
           months on each account, and an explanation of why the Utility Deposit is  
           inadequate assurance of payment;
- 23       b. The Request must be actually received by Debtor and Debtor's counsel,  
           Micaela Rustia Moore, Esq., Fox Rothschild LLP, 3800 Howard Hughes  
           Parkway, Suite 500, Las Vegas, Nevada 89169, within forty-five (45)

1 days of the date of the interim order granting this Motion (the “Request  
 2 Deadline”);  
 3

- 4
- 5 c. Without further order of the Court, Debtor may enter into agreements  
 6 granting additional adequate assurance to a Utility Provider serving a  
 7 timely Request, if Debtor, in its discretion, determines that the Request is  
 8 reasonable;
  - 9
  - 10 d. If Debtor believes that a Request is unreasonable, then Debtor shall,  
 11 within thirty (30) days after the Request Deadline date, file a motion  
 12 pursuant to section 366(c)(2), (a “Determination Motion”), seeking a  
 13 determination from the Court that the Utility Deposit, plus any additional  
 14 consideration offered by Debtor, constitutes adequate assurance of  
 15 payment. Pending notice and a hearing on the Determination Motion, the  
 16 Utility Provider that is the subject of the unresolved Request may not  
 17 alter, refuse, or discontinue services to Debtor nor recover or setoff  
 18 against a prepetition date deposit; and
  - 19 e. Any Utility Provider that fails to make a timely Request shall be deemed  
 20 to be satisfied that the Utility Deposit provided to it constitutes adequate  
 21 assurance of payment.

22 17. If Debtor supplements the list on **Exhibit A** attached hereto subsequent to the filing of  
 23 this Motion, Debtor will serve a copy of this Motion and the signed order granting the Motion (the  
 24 “Order”) on any Utility Provider that is added to the list by such a supplement (the “Supplemental  
 25 Service”).

26 18. Concurrently with the Supplemental Service, Debtor will file with the Court a  
 27 supplement to **Exhibit A** adding the name of the Utility Provider so served. The added Utility Provider  
 1 shall have thirty (30) days from the date of service of this Motion and the Order to make a Request. In  
 2 addition, Debtor may also provide a Utility Deposit to the Utility Provider that is added to the list by  
 3 such supplement without further order from the Court.

4 19. Finally, Debtor may terminate the services of any Utility Provider by providing written  
 5 notice (a “Termination Notice”). Upon receipt of a Termination Notice by a Utility Provider, pursuant  
 6 to the relief requested by Debtor herein, the Utility Provider shall immediately refund any Utility  
 7 Deposit and/or prepetition deposit to Debtor, without giving effect to any rights of setoff or any claims  
 8 the Utility Provider may assert against Debtor. Debtor believes that the immediate refund of a Utility  
 9 Deposit or prepetition deposit by a Utility Provider whose services are terminated is fair and appropriate

1 under the circumstances because the Utility Provider would no longer require adequate assurance of  
 2 future payment by Debtor.

3 **IV.**

4 **LEGAL AUTHORITY**

5 Section 105(a) authorizes the bankruptcy court to “issue any order, process, or judgment that is  
 6 necessary or appropriate to carry out the provisions of [Title 11].” Walls v. Wells Fargo Bank, N.A.,  
 7 276 F.3d 502, 506 (9th Cir. 2002).

8 Pursuant to Bankruptcy Code section 366, a utility may not alter, refuse, or discontinue services  
 9 to, or discriminate against, a debtor solely on the basis of the commencement of the bankruptcy case or  
 10 the debtor’s failure to pay a prepetition debt unless the debtor fails to furnish adequate assurance of  
 11 payment for postpetition services, in the form of a deposit or other security, within twenty (20) days  
 12 after the commencement of the case:

- 13           (a) Except as provided in subsections (b) and (c) of this section, a  
               utility may not alter, refuse, or discontinue service to, or  
               discriminate against, the trustee or the debtor solely on the basis  
               of the commencement of a case under this title or that a debt  
               owed by the debtor to such utility for service rendered before the  
               order for relief was not paid when due.
- 17           (b) Such utility may alter, refuse, or discontinue service if neither the  
               trustee nor the debtor, within 20 days after the date of the order  
               for relief, furnishes adequate assurance of payment, in the form of  
               a deposit or other security, for service after such date. On request  
               of a party in interest and after notice and a hearing, the court may  
               order reasonable modification of the amount of the deposit or  
               other security necessary to provide adequate assurance of  
               payment.
- 22           (c) (1)(A) For purposes of this subsection, the term “assurance of  
               payment” means—
  - 24           (i) a cash deposit;
  - 25           (ii) a letter of credit;
  - 26           (iii) a certificate of deposit;
  - 27           (iv) a surety bond;
  - 28           (v) a prepayment of utility consumption; or

(vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee.

(B) For purposes of this subsection an administrative expense priority shall not constitute an assurance of payment.

(2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility.

(3)(A) On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment under paragraph (2).

(B) In making a determination under this paragraph whether an assurance of payment is adequate, the court may not consider—

- (i) the absence of security before the date of the filing of the petition;
  - (ii) the payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition; or
  - (iii) the availability of an administrative expense priority.

(4) Notwithstanding any other provision of law, with respect to a case subject to this subsection, a utility may recover or set off against a security deposit provided to the utility by the debtor before the date of the filing of the petition without notice or order of the court.

11 U.S.C. § 366.

Section 366(c)(2) of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, specifically addresses utility services to a chapter 11 debtor. See 11 U.S.C. § 366(c)(2). Section 366(c)(2) of the Bankruptcy Code provides that a utility company may alter, refuse, or discontinue service, if within thirty (30) days after a chapter 11 filing, such utility has not received adequate “assurance of payment” that is satisfactory to the utility. See id. Specifically enumerated among the possible forms for providing “assurance of payment” is the option to provide a cash deposit, among other things. Id. at § 366(c)(1)(A). Although the alternative forms for assurance of payment is specified by the Bankruptcy Code, determining the amount of assurance that must be

1 provided is within the court's discretion. See 11 U.S.C. § 366(b) ("On request of a party in interest and  
 2 after notice and a hearing, the court may order reasonable modification of the amount of the deposit or  
 3 other security necessary to provide adequate assurance of payment."); 11 U.S.C. § 366(c)(3)(A) ("On  
 4 request of a party in interest and after notice and a hearing, the court may order modification of the  
 5 amount of an assurance of payment under paragraph (2)."); Accord In re Pacific Gas & Elec. Co., 271  
 6 B.R. 626, 644 (N.D. Cal. 2002) ("The use of the word 'may' in the second sentence [of § 366(b)]  
 7 contemplates that the decision of whether to order security lies within the discretion of the Bankruptcy  
 8 Court."); In re Steinbach, 303 B.R. 634, 641 (Bankr. D. Ariz. 2004) ("Bankruptcy courts are afforded  
 9 reasonable discretion in determining what constitutes adequate protection. . . .").

10 While the form of adequate assurance of payment may be limited under subsection 366(c) to the  
 11 types of security enumerated in subsection 366(c)(1)(A), the amount of the deposit or other form of  
 12 security, however, remains fully within the reasonable discretion of the Court, subject only to three  
 13 specific factors that may not be considered by the Court, as listed in subsection 366(c)(3)(B). Under  
 14 such subsection, when determining "whether an assurance of payment is adequate," the Bankruptcy  
 15 Court may not consider: (1) whether the debtor had a prepetition deposit; (2) whether the debtor paid its  
 16 utility bills on time prepetition; or (3) the administrative expense priority afforded utilities postpetition.  
 17 11 U.S.C. § 366(c)(3)(B).

18 Debtor proposes to make a cash deposit to each of the Utility Providers equal to one half of a  
 19 month's average historical invoice amount, determined using an average of the monthly invoice  
 20 amounts for the six (6) months immediately preceding the Petition Date. Debtor submits that one-half  
 21 month's billing, based on the historical average of the previous six months, is more than adequate under  
 22 the totality of the facts and circumstances.<sup>4</sup> Accordingly, bankruptcy courts have deemed cash deposits  
 23 in amounts commensurate with Debtor's proposed adequate assurance deposit to be adequate assurance  
 24 of payment. See, e.g., In re 155 East Tropicana, LLC, Case No. 11-55516-BAM, Dkt. No. 62 (Bankr.  
 25 D. NV 2011) (approving, as adequate assurance of payment, deposit equal to 50% of Company's

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26       <sup>4</sup> See Adelphia Business Solutions, 280 B.R. 63, 82-83, and 86 n. 127 (Bankr. S.D.N.Y. 2002)  
 27 (adequate assurance of payment is a fact-driven analysis based on the totality of the facts and  
 28 circumstances of the case).

1 estimated cost of their monthly utility consumption); In re Pac-West Telecomm, Inc., Case No. 07-  
 2 10562 (Bankr. D. Del. June 4, 2007) (approving, as adequate assurance of payment, one-time  
 3 supplemental prepayment equal to one week's worth of utility charges); In re The N.Y. Racing Ass'n,  
 4 Inc., Case No. 06-12618 (Bankr. S.D.N.Y. Dec. 1, 2006) (approving, as adequate assurance of payment,  
 5 cash deposit equal to two-week's worth of utility charges).

6 Here, Debtor satisfies the criteria considered by courts in finding that adequate assurance of  
 7 payment has been shown, as the Utility Providers will not suffer an unreasonable risk of nonpayment  
 8 with half a month's deposit. Moreover, Debtor proposes to protect the Utility Providers further by  
 9 establishing the Procedures provided for herein, whereby any Utility Provider can request additional  
 10 adequate assurance in the event that it believes there are facts and circumstances with respect to its  
 11 providing postpetition services to Debtor that would merit greater protection.

12 Debtor cannot continue to operate without continued Utility Services. If any of the Utility  
 13 Providers alter, refuse or discontinue service, even for a brief period, Debtor's business operations  
 14 would be severely disrupted and Debtor would be unable to maintain its business.

15 In contrast, the Utility Providers will not be prejudiced by the continuation of their services and  
 16 will be paid all postpetition utility charges. In addition, the rights of the Utility Providers will not be  
 17 prejudiced should the relief requested in this Motion be granted because the Utility Companies are  
 18 permitted to come before this Court and seek relief according to the Procedures proposed. Hence,  
 19 Debtor requests an Order prohibiting the Utility Providers from altering, refusing, or discontinuing  
 20 service to Debtor conditioned solely upon Debtor's providing each of the Utility Providers with a one-  
 21 half month's deposit (or such other amount as determined in accordance with the Procedures). Once  
 22 Debtor pays the Deposits, Debtor submits that it will have furnished the requisite adequate assurance of  
 23 payment to the Utility Providers.

24 Debtor's proposed method of furnishing adequate assurance of payment for postpetition Utility  
 25 Services is not prejudicial to the rights of any Utility Provider and is in the best interests of Debtor, its  
 26 estate and its creditors. This Court has approved similar procedures and deposits to those requested  
 27  
 28

1 herein following the enactment of BAPCPA.<sup>5</sup>

2 Because uninterrupted Utility Services are vital to the continued operation of Debtor's business,  
 3 and, consequently, to the success of its Chapter 11 Case, the relief requested herein is necessary and in  
 4 the best interests of Debtor, its estate and its creditors. Such relief ensures that Debtor's business  
 5 operations will not be disrupted. In addition, the Utility Providers and Debtor will have an orderly and  
 6 fair procedure for determining any additional requests for adequate assurance.

7 **V.**

8 **NOTICE**

9 Notice of this Motion has been given by e-mail, facsimile or overnight delivery to the following  
 10 parties, or in lieu thereof, to their counsel: (1) the United States Trustee, (2) the parties included on  
 11 Debtor's list of twenty (20) creditors holding the largest unsecured claims, and (3) those Utility  
 12 Providers identified on **Exhibit A** attached hereto. In light of the nature of the relief requested herein,  
 13 Debtor submits that no other or further notice is required.

14 **VI.**

15 **CONCLUSION**

16 WHEREFORE, for all of the foregoing reasons, Debtor respectfully requests that this Court  
 17 enter an Order, substantially in the form attached hereto as **Exhibit A**, (a) prohibiting the Utility  
 18 Providers from altering, refusing and discontinuing service relationships or terms on account of  
 19 prepetition invoices; (b) authorizing payment (i) of the Utility Deposits, and (ii) in the ordinary course  
 20 of amounts due to the Utility Providers arising from current and postpetition invoices, including  
 21 amounts for Utility Services provided to Debtor prepetition; and, (iii) upon Debtor making such  
 22 payments, deeming the Utility Providers adequately assured of Debtor's future performance; (c)

23 ///

24 ///

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25  
 26 <sup>5</sup> See In re 155 East Tropicana, LLC, Case No. 11-22216-BAM; In re Station Casinos, Inc., Case  
 27 No. 09-52477-GWZ; In re R.M. Precision Swiss Inc. of Nevada, Case No. 07-14030-BAM; In re  
Americana, LLC, Case No. 07-17845-BAM; In re FX Luxury Las Vegas I, LLC, Case No. 10-17015-  
 28 BAM.

1 establishing the procedures set forth herein for determining any requests for additional adequate  
2 assurance; and (d) granting such other and further relief as this Court deems just and appropriate.

3 DATED this 22nd day of January 2014.

4 **MARTIFER SOLAR USA, INC., a California corporation**

5 By \_\_\_\_\_  
6

Klaus Bernhart, Chief Financial Officer

7  
8 Respectfully submitted by:  
9

10 **FOX ROTHSCHILD LLP**

11 By: /s/Brett A. Axelrod  
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## **EXHIBIT B**

## **\*PROPOSED FORM OF ORDER\***

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*[Proposed] Counsel for Martifer Solar USA, Inc.*

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

In re

Case No. BK-S-14-10357-abl

MARTIFER SOLAR USA, INC., a  
California corporation,

Chapter 11

## Debtor.

**ORDER (1) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING OR DISCONTINUING SERVICE; (2) AUTHORIZING ORDINARY COURSE PAYMENTS TO UTILITY PROVIDERS; (3) DEEMING UTILITY PROVIDERS ADEQUATELY ASSURED OF FUTURE PERFORMANCE; AND (4) ESTABLISHING PROCEDURES FOR DETERMINING REQUESTS FOR ADDITIONAL ADEQUATE ASSURANCE**

Hearing Date:  
Hearing Time:

The Court, having reviewed and considered Debtor's Motion (the "Motion"),<sup>1</sup> for an Order (1) Prohibiting Utility Providers From Altering, Refusing or Discontinuing Service; (2) Authorizing

<sup>1</sup> All capitalized terms not otherwise defined herein shall have the same meaning ascribed in the Motion.

1 Ordinary Course Payments to Utilities Providers; (3) Deeming Utility Providers Adequately Assured  
 2 of Future Performance; and (4) Establishing Procedures for Determining Requests for Additional  
 3 Adequate Assurance (the “Order”) and the Omnibus Declaration of Klaus Bernhart filed in support of  
 4 Debtor’s First Day Motions (the “Omnibus Declaration”); all pleadings and evidence submitted in  
 5 connection with the Motion; and the oral arguments made at the hearing held on January \_\_, 2014;  
 6 with appearances as noted in the record; it appearing that this Court has jurisdiction to consider the  
 7 Motion pursuant to 28 U.S.C. §§157 and 1334; it appearing that venue of this Chapter 11 Case in this  
 8 District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that this matter is a core  
 9 proceeding pursuant to 28 U.S.C. § 157(b); notice of the Motion being good and sufficient and  
 10 appropriate under the circumstances; and for good cause appearing,

11           **IT IS HEREBY ORDERED**, as to Debtor’s existing utility accounts, that:

12           1.       The Motion is GRANTED;  
 13           2.       The utility providers (the “Utility Providers”), as listed on **Exhibit A** attached hereto,  
 14 are hereby prohibited from altering, refusing and discontinuing service relationships or terms on  
 15 account of prepetition invoices;

16           3.       Debtor is authorized to (a) provide the Utility Providers, upon request, sums equal to  
 17 fifty percent (50%) of Debtor’s estimated monthly costs for utility services for each of the Utility  
 18 Providers (each sum, a “Utility Deposit”), based upon an average of Debtor’s monthly utility costs for  
 19 the six (6) months immediately preceding the Petition Date; and (b) pay in the ordinary course of  
 20 business amounts due to the Utility Providers for Utility Services (as defined in the Motion) provided  
 21 to Debtor prepetition (the “Ordinary Course Payments,” and together with the Utility Deposit, the  
 22 “Adequate Assurance Payments”);

23           4.       Upon Debtor’s payment of the Adequate Assurance Payments, the Utility Providers  
 24 shall be deemed adequately assured of Debtor’s future performance pursuant to 11 U.S.C. § 366;

25           5.       If any Utility Provider believes additional assurance is required, it may request such  
 26 additional assurance pursuant to the procedures set forth herein as follows:

27           5.1.       If a Utility Provider is not satisfied with the assurance of future  
 28 payment provided by Debtor pursuant to the proposed Utility Deposit, the Utility

1           Provider must serve a written request (the “Request”) upon Debtor setting forth  
 2           the locations for which Utility Services are provided, the account numbers for  
 3           such locations, the outstanding balance for each account, a summary of Debtor’s  
 4           monthly historical utility use over the past six months on each account, and an  
 5           explanation of why the Utility Deposit is inadequate assurance of payment;

6           5.2.       The Request must be actually received by Debtor and Debtor’s  
 7           counsel, Micaela Rustia Moore, Esq., Fox Rothschild LLP, 3800 Howard Hughes  
 8           Parkway, Suite 500, Las Vegas, Nevada 89169, within 45 days of the date of the  
 9           interim order granting this Motion (the “Request Deadline”);

10          5.3.       Without further order of the Court, Debtor may enter into  
 11           agreements granting additional adequate assurance to a Utility Provider serving a  
 12           timely Request, if Debtor, in its discretion, determines that the Request is  
 13           reasonable;

14          5.4.       If Debtor believes that a Request is unreasonable, then Debtor  
 15           shall, within 30 days after the Request Deadline date, file a motion pursuant to  
 16           section 366(c)(2) of the Bankruptcy Code (a “Determination Motion”), seeking a  
 17           determination from the Court that the Utility Deposit, plus any additional  
 18           consideration offered by Debtor, constitutes adequate assurance of payment.  
 19           Pending notice and a hearing on the Determination Motion, the Utility Provider  
 20           that is the subject of the unresolved Request may not alter, refuse, or discontinue  
 21           services to Debtor nor recover or setoff against a prepetition date deposit; and

22          5.5.       Any Utility Provider that fails to make a timely Request shall be  
 23           deemed to be satisfied that the Utility Deposit provided to it constitutes adequate  
 24           assurance of payment.

25           **IT IS FURTHER ORDERED** that:

26          6.       If Debtor supplements the list on **Exhibit A** attached hereto subsequent to the filing of  
 27           this Motion, Debtor will serve a copy of this Motion and the signed order granting the Motion (the

1       “Order”) on any Utility Provider that is added to the list by such a supplement (the “Supplemental  
 2       Service”).

3           7.       Concurrently with the Supplemental Service, Debtor will file with the Court a  
 4       supplement to **Exhibit A** adding the name of the Utility Provider so served. The added Utility  
 5       Provider shall have 30 days from the date of service of this Motion and the Order to make a Request.  
 6       In addition, Debtor may also provide a Utility Deposit to the Utility Provider that is added to the list  
 7       by such supplement without further order from the Court.

8           8.       Finally, the Order provides that Debtor may terminate the services of any Utility  
 9       Provider by providing written notice (a “Termination Notice”). Upon receipt of a Termination Notice  
 10      by a Utility Provider, pursuant to the relief requested by Debtor herein, the Utility Provider shall  
 11      immediately refund any Utility Deposit and/or prepetition deposit to Debtor, without giving effect to  
 12      any rights of setoff or any claims the Utility Provider may assert against Debtor. The immediate  
 13      refund of a Utility Deposit or prepetition deposit by a Utility Provider whose services are terminated  
 14      is fair and appropriate under the circumstances because the Utility Provider would no longer require  
 15      adequate assurance of future payment by Debtor.

16           **IT IS FURTHER ORDERED**, as to new accounts opened by Debtor as debtor-in-possession,  
 17      that:

18           9.       Utility Providers and any other company providing Utility Services to Debtor shall  
 19      treat Debtor like any other customer under applicable public utility regulations.

20           10.      If a Utility Provider or any other company providing Utility Services to Debtor  
 21      discriminates against Debtor on account of its bankruptcy filing by seeking to impose an additional or  
 22      higher deposit or other requirements, the Court will consider a request for relief by Debtor with notice  
 23      to the utility provider on an expedited basis.

24           **IT IS FURTHER ORDERED** that:

25           11.      Debtor is authorized and empowered to take all actions necessary to implement the  
 26      relief granted in this Order.

27           12.      This Court shall retain jurisdiction to hear and determine all matters arising from the  
 28      implementation of this Order.

1           13. The terms and conditions of this Order shall be immediately effective and enforceable  
 2 upon its entry.

3           14. Except to the extent expressly provided herein and any actions taken pursuant hereto,  
 4 nothing herein shall be deemed: (i) an admission as to the validity of any claim against Debtor; (ii) a  
 5 waiver of Debtor's right to dispute any claim on any grounds; (iii) a promise or requirement to pay  
 6 any claim; (iv) an implication or admission that any particular claim is of a type specified or defined  
 7 hereunder; (v) a request or authorization to assume any agreement, contract or lease pursuant to  
 8 section 365 of the Bankruptcy Code; or (vi) a waiver of Debtor's rights under the Bankruptcy Code or  
 9 any other applicable law.

10          15. Except to the extent expressly provided herein and any actions taken pursuant hereto,  
 11 nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of,  
 12 any claim held by any person.

13          16. Debtor's banks and financial institutions are authorized and directed to process, honor  
 14 and pay, to the extent of funds on deposit, any and all prepetition checks, wire transfer requests or  
 15 intercompany transfer requests issued by Debtor, whether pre or postpetition, subject to, and in  
 16 accordance with, the terms of this Order. Debtor is authorized to reissue checks, wire transfer  
 17 requests or intercompany requests where such method of payment has been dishonored.

18          Prepared and Respectfully Submitted by:

19          **FOX ROTHSCHILD LLP**

20          By \_\_\_\_\_

21           BRETT A. AXELROD, ESQ.  
 22           Nevada Bar No. 5859

23           MICAELA RUSTIA MOORE, ESQ.

24           Nevada Bar No. 9676

25           3800 Howard Hughes Parkway, Suite 500  
 26           Las Vegas, Nevada 89169

27          *[Proposed] Counsel for Martifer Solar USA, Inc.*

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FOX ROTHSCHILD LLP  
 3800 Howard Hughes Parkway, Suite 500  
 Las Vegas, Nevada 89169  
 (702) 262-6899  
 (702) 597-5503 (fax)

1 APPROVED/DISAPPROVED:

2 **OFFICE OF THE UNITED STATES TRUSTEE**

3 BY: \_\_\_\_\_

4 J. Michal Bloom  
5 Trial Attorney for Acting United States Trustee,  
6 Tracy Hope Davis  
7

8 **CERTIFICATION OF COUNSEL PURSUANT TO LOCAL RULE 9021**

9 In accordance with Local Rule 9021, counsel submitting this document certifies as follows:

- 10  The Court has waived the requirement of approval in LR 9021(b)(1).  
11  No party appeared at the hearing or filed an objection to the motion  
12  I have delivered a copy of this proposed order to all counsel who appeared  
13 at the hearing, any unrepresented parties who appeared at the hearing, and  
14 each has approved or disapproved the order, or failed to respond, as  
indicated below:

15 J. MICHAL BLOOM, OFFICE OF  
16 THE UNITED STATES TRUSTEE

17 Approved / Disapproved  
18 \_\_\_\_\_

- 19  I certify that this is a case under Chapter 7 or 13, that I have served a  
20 copy of this order with the motion pursuant to LR 9014(g), and that no  
21 party has objected to the form or content of the order.

22 # # #  
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1                   **EXHIBIT A**  
2                   Utility Providers  
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FOX ROTHSCHILD LLP  
3800 Howard Hughes Parkway, Suite 500  
Las Vegas, Nevada 89169  
(702) 262-6899  
(702) 597-5503 (fax)

**Martifer Solar USA, Inc.****Utility Accounts**

Account No.	Debtor	Vendor Names	Type of Utility
4100050113	Martifer Solar USA, Inc.	Avaya	Office Phone
6000687956	Martifer Solar USA, Inc.	Citrix Online	Office Phone
169 703 4842 7	Martifer Solar USA, Inc.	Gas Company	Gas
4000000295560	Martifer Solar USA, Inc.	XO Communications	Office Phone
042 215 1000	Martifer Solar USA, Inc.	LADWP	Power
10095489	Martifer Solar USA, Inc.	PowerNet Global	Office Phone
772521237-00001	Martifer Solar USA, Inc.	Verizon (Cells)	Cell Phone
772521237-00002	Martifer Solar USA, Inc.	Verizon (Air Cards)	Cell Phone
01 1717 1128693497 07	Martifer Solar USA, Inc.	Verizon (Fax)	Office Phone
8448 20 034 0249522	Martifer Solar USA, Inc.	Time Warner Cable	Cable TV
2-35-542-0688	Martifer Solar USA, Inc.	Southern CA Edison	Power